

## **Alternative Dispute Resolution and Art-Law - A New Research Project of the Geneva Art-Law Centre\***

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**Abstract.** This article introduces the new research project of the Geneva Art-Law Centre, which aims to study alternative dispute resolution (ADR) methods for art-related disputes. It gives a brief introduction on the topic of the research the project - the significant potential of ADR mechanisms in art law - and provides an overview of the growing international consideration for ADR in art-law matters. While types of art-related disputes vary considerably from case to case, certain common features may be identified to explain the need for adapted dispute resolution in this area. The Art-Law Centre's research project will involve the creation of an Art-Law ADR Database recording art-related disputes worldwide that were resolved by means of ADR methods, as well as a thorough case analysis. To illustrate the nature of the research project, this paper specifies the different project stages and gives examples of collected art-law cases.

### **1. Introduction**

At the heart of a “plundering maze” regarding a collection of Mayan pre-Columbian artifacts, the situation seems deadlocked (IFAR). The Mayan cultural objects were privately donated to the Museum of Fine Arts (MFA) Boston in 1988 and, according to the Guatemalan government and archaeologists, previously looted and illegally exported under Colombian law (Yemma & Robinson, 1997). On the other hand, the MFA asserts that the Guatemalan government would be barred under U.S. statute of limitations to press claims (Ibid). To date, this case still seems to be unresolved (IFAR). This is just one out of many art-law disputes in which both legal and sensitive non-legal issues can come into play and may need to be considered in the decision-resolution process. Indeed, disputes involving art and cultural property are on the rise and they can be as multi-faceted as the manifold forms of art itself. Art-law disputes have particular features for which alternative dispute resolution (ADR) methods may often be more appropriate than traditional national court litigation.

In a new research project, the Geneva Art-Law Centre aims to analyze alternative methods for resolving art-law disputes, such as mediation or arbitration. As further explained below, the core of the research project consists in the development of a database that records art-law cases that were resolved through ADR.

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The Geneva Art-Law Centre was the first institution in Europe entirely devoted to research in the field of art law and cultural property. It was created in 1991 as a non-profit Swiss foundation and is now fully integrated in the Law Faculty of the University of Geneva. Its board of trustees, directors and advisors include legal academics as well as representatives from the art world. It promotes and coordinates research in the field of art law in an interdisciplinary manner. In particular, the Art-Law Centre offers teaching, organizes symposia and seminars, provides legal advice to public and private entities, issues publications and operates a specialized documentation centre with numerous art law references.<sup>1</sup> Similar institutions have now been established in other countries such as Australia<sup>2</sup>, France<sup>3</sup>, Germany<sup>4</sup> and the United Kingdom<sup>5</sup>, and the interest for art law has been growing worldwide ever since.

The following provides a brief background on the potential of ADR for resolving art-law disputes and explains the nature of the new research project of the Art-Law Centre, by referring to examples of collected cases, such as the mediation settlement between Saint-Gall and Zurich for the return of war-looted cultural objects, the negotiation agreement regarding drawings belonging to the Feldmann family and the well known arbitration concerning the restitution to Maria Altmann of various Klimt masterpieces by the Austrian Republic.

## **2. Why ADR for Art-Law Disputes?**

### *2.1 Particular Features of Art-Law Disputes*

While there is no definition of art law, it can be understood as an interdisciplinary area that includes “all the aspects of law that are connected with the creation, exhibition, reproduction, sale and transfer of property of both works of art and cultural objects”, and concerns “legal fields as varied as international law (both public and private), property law, copyright, insurance, customs and tax law”.<sup>6</sup>

Art-law disputes are equally diverse and may involve a variety of private or public parties, such as artists, auction houses, art collectors and dealers, galleries, indigenous communities, museums, States, and many more. Such disputes may be contractual, relating for example to art sales, loan or insurance agreements. They may also be non-contractual, concerning for example the restitution of a work of art that has been stolen from its original owner, or the return of an illicitly exported cultural object.

While there are a variety of types of art-law disputes, certain common features may be identified in such disputes that explain the need for adapted dispute resolution methods in this area. For example, some authors regard the nature of the objects involved in such disputes as special in light of their “cultural and immaterial value” (Byrne-Sutton, 1998, p.447). Also, the subject matter is often specific, which is why legal and technical expertise is important for the resolution of such disputes, which a national judge may not always have.

Art-law disputes are often international, involving parties from different cultural backgrounds. In international art-law disputes, several national court actions may need to be introduced in the jurisdictions concerned by the dispute. This may not only be costly and lengthy, but there may also be potential conflict of laws issues, as well as a risk of contradictory outcomes as legislation on art law is not fully harmonized. For example, civil and common law countries have a different approach as to the good-faith acquisition of stolen

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<sup>1</sup> For more details, see the Art-Law Centre’s website at [www.art-law.org](http://www.art-law.org) (Retrieved September 6, 2010).

<sup>2</sup> See the Arts Law Centre of Australia, [www.artslaw.com.au/](http://www.artslaw.com.au/) (Retrieved September 6, 2010).

<sup>3</sup> See the Centre of Studies on International Legal Cooperation (*Centre d’Etudes sur la Coopération Juridique Internationale*) CECOJI-GDRI, Poitiers (France), below in section 0.

<sup>4</sup> See The Institute of Art and Law IFKUR (*Institut für Kunst und Recht*), Heidelberg (Germany), <http://ifkur.de> (Retrieved September 6, 2010).

<sup>5</sup> See The Institute of Art and Law, Bulth Wells (United Kingdom), [www.ial.uk.com/](http://www.ial.uk.com/) (Retrieved September 6, 2010).

<sup>6</sup> See the Art-Law Centre’s website [www.art-law.org/centre/presentation\\_en.html](http://www.art-law.org/centre/presentation_en.html) (Retrieved September 6, 2010).

cultural property (Renold, 2003). In that light, truly neutral and international dispute resolution methods are needed to address these concerns.

Further, art-law disputes may raise sensitive, not necessarily legal issues, of a cultural, emotional, ethical, historical, moral, political, religious, or spiritual nature. For instance, this may be the case where an indigenous community is involved that claims from a museum the return of a cultural object that it regards as sacred. Finally, remedies traditionally available in court, such as monetary damages, may not always be appropriate in art-law disputes, which may require more sustainable and creative solutions.

## *2.2 Benefits of ADR for Resolving Art-Law Disputes*

Litigation in a national court may be entirely appropriate in certain art-law disputes, for example where an uncooperative party is involved, or where a legal precedent is sought. However, court litigation is generally a public process that concludes with a winning and a losing party, which may affect professional relationships in the art-market and may not necessarily take account of all the interests and issues at stake.

In light of the particular features of art-law disputes, many authors have recognized the benefits of ADR (Cornu & Renold, 2010; Palmer, 2009; Siehr, 2009, 2000; Theurich, 2009, July; Kaufmann-Kohler, 1999; Byrne-Sutton, 1998).

ADR can be defined as private, out-of-court dispute resolution mechanisms, which allow parties to resolve their dispute in a more flexible, time and cost efficient way, giving them control over the process and the possibility to select one or several qualified independent mediators, arbitrators or experts. ADR mechanisms are generally consensual and can only be used if all parties consent to submitting their dispute to ADR (WIPO Arbitration and Mediation Center, 2007; Lew, Mistelis, & Kröll, 2003).

Mediation is an informal procedure in which a mediator helps parties to settle their dispute through facilitating dialogue and helping identifying their interests but without imposing any decision (WIPO Arbitration and Mediation Center, 2009a). In arbitration, an arbitrator renders a final and binding decision (arbitral award) on the parties' dispute that is internationally enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).<sup>7</sup>

Considering the nature of ADR as described above, the benefits of ADR for the resolution of art-law disputes appear clear. For example, parties can choose the person of the mediator or arbitrator with the necessary expertise of the art law issues at stake and an understanding of the cultural backgrounds. Hence, in an art restitution dispute, parties could for instance appoint a mediator or arbitrator who is a specialist of art-restitution policies.

ADR also allows parties to resolve an international art-law dispute that concerns different jurisdictions in a single neutral procedure. Parties can for example choose the applicable law, language and place of mediation or arbitration. This has the advantage of avoiding potential conflict of laws issues, and permits to choose specific art law legal instruments as applicable law.

ADR, and in particular mediation, provides a flexible forum, in which legal as well as sensitive non-legal issues may be considered. Indeed, in cases where legal obstacles, such as statutes of limitations, may bar a court action, mediation may allow parties to seek interest-based solutions that take account of moral elements. For example, in a dispute about the restitution of an artwork that was stolen from the original owner during the Second World War decades ago and since acquired in good faith by a cultural institution, both the heirs of the original owner and the cultural institution may have a moral interest in finding a balanced solution out of court. Also, in art-law disputes involving indigenous communities, ADR may be a forum in which customary laws can

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<sup>7</sup> On arbitration, see for example WIPO Arbitration and Mediation Center (2009b).

be considered. A WIPO Study on “Customary Law and the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge” considered that customary laws may be incorporated into ADR proceedings such as to provide guidance on substantive issues in a dispute, to establish adapted procedures, and to determine certain remedies (WIPO, 2006).

Moreover, ADR allows parties to adopt mutually satisfactory solutions beyond monetary remedies. There is a wealth of possible creative solutions that parties may explore, reaching from the provision of art works in lieu of monetary damages to the conclusion of capacity building programs. In the context of art restitution disputes, authors have suggested solutions, such as the restitution of the cultural object accompanied by cultural collaboration initiatives, the recognition of the importance of a cultural object for the cultural identity of one of the parties, the conclusion of loan agreements, donations, specific ownership arrangements (such as shared ownership or the creation of a trust), the creation of a copy of the disputed cultural object, the withdrawal of a restitution claim in exchange for a monetary compensation (Cornu & Renold, 2010).

Except where otherwise required by law, ADR mechanisms allow parties, to a large extent, to keep the proceedings and outcomes confidential, and thereby preserve their reputation and professional relationships, which may be key in the international market. However, in certain art-law disputes, especially those involving considerable public interest, parties have decided to publish information about the outcome of their dispute. Such information may indeed allow parties, mediators and arbitrators to seek guidance from previous settlement agreements or arbitral awards, illustrate the application of specific legal art-law provisions, the variety of possible and available solutions, and inspire parties in their own dispute-resolution process. The development of the Geneva Art-Law Centre’s database with art-law cases that were resolved through ADR may indeed contribute to making such information more accessible.

### **3. International Consideration of ADR for the Resolution of Art-Law Disputes**

The potential of ADR for the resolution of art-law disputes has been gaining increasing international consideration.

#### *3.1 Institutional Level*

A number of international organizations and institutions have recognized the potential of ADR for the resolution of disputes in the area of art and culture.

For example, in the forum of the United Nations Educational Scientific and Cultural Organization (UNESCO)<sup>8</sup>, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) has seen mediation and conciliation added to its mandate in 2005 in order to facilitate the return and restitution of cultural property (UNESCO, 2005). Specific Rules of Procedure for Mediation and Conciliation have been developed by the ICPRCP for the resolution of such disputes.<sup>9</sup>

UNESCO has been supportive of the collection of information about cases over the restitution or return of cultural property resolved through ADR, and has encouraged the new research project of the Art-Law Centre.

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<sup>8</sup> UNESCO is an intergovernmental organization based in Paris, France, whose mission is to contribute to the building of peace, the eradication of poverty, sustainable development and intercultural dialogue through education, the sciences, culture, communication and information (see [www.unesco.org](http://www.unesco.org)) (Retrieved September 6, 2010). It has currently 193 Member States.

<sup>9</sup> For the status, see the ICPRCP’s website at: [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35283&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html) (Retrieved September 6, 2010).

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, adopted in 1995 under the aegis of the International Institute for the Unification of Private Law (UNIDROIT),<sup>10</sup> provides in Article 8(2) that parties may agree to submit disputes over the restitution of stolen cultural objects or the return of illegally exported cultural objects also to arbitration.

The World Intellectual Property Organization's (WIPO)<sup>11</sup> Arbitration and Mediation Center promotes since 1994, on a not-for-profit basis, neutral cost and time effective ADR of international commercial disputes between private parties.<sup>12</sup> The WIPO Arbitration and Mediation Center provides different ADR procedures under WIPO Rules, such as mediation, arbitration and expert determination.<sup>13</sup> These Rules are particularly adapted for intellectual property related disputes and have been regarded as appropriate for art-law disputes. The WIPO Arbitration and Mediation Center develops indeed tailored ADR services for art and cultural heritage disputes. It thereby collaborates with WIPO's Program on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions /Expressions of Folklore, as well as WIPO's Copyright Program. In particular, it has identified a specific list of art and cultural heritage mediators and arbitrators. A number of art-law cases have already been filed with the WIPO Arbitration and Mediation Center, involving different stakeholders, such as an artist, galleries, a museum, an indigenous community, and a producer of artistic performances.

The International Council of Museums (ICOM), a not-for-profit non-governmental organization created in 1946, is also developing its mediation program for disputes involving museums (Cummins, 2006).

Further, the Permanent Court of Arbitration held a Conference in 2003 on the "Resolution of Cultural Property Disputes".<sup>14</sup> The issues of the burden of proof, time limitations and good faith that often arise in cultural property disputes were particularly emphasized, and the adoption of specific arbitration rules for such disputes was considered at the Conference (van den Hout, 2004).

### *3.2 Non-binding Principles on Looted Art in the Holocaust Era*

Governmental reflections on the resolution of issues relating to art looted during the Holocaust era have also included considerations of and references to ADR. For example, the Holocaust Era Assets Conference in Washington in 1998 has resulted in the non-binding "Washington Conference Principles on Nazi-Confiscated Art of December 3, 1998". Principle 11 explicitly encourages the consideration of ADR for the resolution of disputes in this area.

The Prague Holocaust Era Assets Conference held from June 26 to 30, 2009, has reconfirmed the potential of ADR for resolving disputes relating to Nazi-looted art. The Terezin Declaration, issued by 46 States on June 30, 2009, refers to "alternative processes" and "alternative dispute resolution" for facilitating "just and fair solutions" in matters relating to Nazi-confiscated and looted art, thereby confirming principle 11 of the Washington Principles of 1998. The practical impact of the Terezin Declaration remains to be seen. However, as voiced in the context of the conference, it may eventually lead to the creation of a US commission akin to the national European advisory commissions.

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<sup>10</sup> UNIDROIT is an independent intergovernmental organization with its seat in Rome (see [www.unidroit.org](http://www.unidroit.org)) (Retrieved September 6, 2010). It currently has 63 Member States.

<sup>11</sup> WIPO is an intergovernmental organization dedicated to develop a balanced and accessible international intellectual property system, with its headquarters in Geneva, Switzerland (see [www.wipo.int](http://www.wipo.int)) (Retrieved September 6, 2010). It currently has 184 Member States.

<sup>12</sup> For further information on the WIPO Arbitration and Mediation Center, see [www.wipo.int/amc](http://www.wipo.int/amc) (Retrieved September 6, 2010).

<sup>13</sup> See for example, WIPO Mediation Rules [www.wipo.int/amc/en/mediation/rules/](http://www.wipo.int/amc/en/mediation/rules/), WIPO Expedited Arbitration Rules [www.wipo.int/amc/en/arbitration/expedited-rules/](http://www.wipo.int/amc/en/arbitration/expedited-rules/), WIPO Arbitration Rules [www.wipo.int/amc/en/arbitration/rules/](http://www.wipo.int/amc/en/arbitration/rules/), WIPO Expert Determination Rules [www.wipo.int/amc/en/expert-determination/rules/](http://www.wipo.int/amc/en/expert-determination/rules/) (Retrieved September 6, 2010).

<sup>14</sup> The results of the conference were published in International Bureau of the Permanent Court of Arbitration, 2004.

### *3.3 Case Collection Efforts*

Efforts have been undertaken by different entities to gather information about art-law cases that were settled out of court. Such listings of settled art-law cases generally cover certain areas of art-law and/or specific jurisdictions. For example, UNESCO has recently engaged in the collection of cases concerning the return of cultural property to its countries of origin or its restitution in case of illicit appropriation. Further, the US law firm Herrick, Feinstein LLP has compiled a chart of “Resolved Stolen Art Claims”, which is available online and includes in particular information on the type of cases, the parties and the dispute resolution method, such as litigation, mediation and arbitration (Herrick, Feinstein LLP, 2009). Also, the International Foundation for Art Research (IFAR), a US based not-for-profit educational and research organization dedicated to integrity in the visual arts,<sup>15</sup> makes available a collection of mainly US case law on different art-law topics. This collection also includes a number of cases that were settled out of court.

With its new research project, the Geneva Art-Law Centre aims to compile a comprehensive database of art-law disputes resolved through ADR worldwide. It endeavours to cover as many jurisdictions as possible and a wide variety of art-law areas, and to undertake a thorough analysis of the collected cases.

## **4. The Art-Law Centre Research Project**

The interest of the Geneva Art-Law Centre for alternative resolution methods for art-law disputes dates back to 1997 when it had organized an international conference on this very subject (Byrne-Sutton & Renold, 1999).

### *4.1 The Research Project*

The Geneva Art-Law Centre’s new research project on “Alternative Dispute Resolution Mechanisms in Art-Law Disputes” was initiated by Professor Marc-André Renold and officially launched in June 2010. It has received funding from the Swiss National Science Foundation (SNSF).<sup>16</sup> The goal of the research project is to create an Art-Law ADR Database that would provide a record of art-law disputes worldwide, which were resolved by means of ADR methods as defined above.<sup>17</sup> The Art-Law Centre’s research team is composed of four art-law PhD candidates (Marie Boillat, Raphaël Contel and the authors of the present article) who work under the guidance of Professor Marc-André Renold, and the topics of the authors’ PhD theses are also closely related to the research project.

In particular, the project aims to examine which types of ADR mechanisms are used in art-law disputes, and which are the decisive criteria that have led parties to opt for out-of-court settlement. The project further endeavours to facilitate broader conclusions on the practical, legal and ethical consequences of the current increase in the use of ADR in the art-law sector. In fact, dispute settlement by means of ADR seems to have continuously developed in the recent years and the research project aims to analyze this trend.

It is hoped that the Art-Law ADR Database will provide a practical tool for stakeholders in the art-law sector that are facing disputes and are looking for information on ADR options and case examples. In deadlocked situations such as for the return of the Mayan artefacts to the Guatemalan government<sup>18</sup>, the forecasted result of the Geneva research project may provide an incentive and guidance to conflicting parties for the settlement of their disputes. For instance, by enumerating the different possible solutions and compromises

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<sup>15</sup> For further information on IFAR, see [www.ifar.org](http://www.ifar.org) (Retrieved September 6, 2010).

<sup>16</sup> For more information on the SNSF, see [www.snf.ch](http://www.snf.ch) (Retrieved September 6, 2010).

<sup>17</sup> See section 0.2 of the present article.

<sup>18</sup> See section 1 of the present article.



reached between cultural institutions museums and other stakeholders, other parties in dispute may be encouraged to explore similar approaches.

#### *4.2 The Research Plan*

The research project will be conducted in three phases: In the first phase, the structure of the Art-Law ADR Database is put into place and relevant documents and information on art-law cases resolved through ADR are collected. In the second phase, the collected information will be analyzed. In the third phase, the results of the research will be discussed in conferences and made available in an appropriate publication.

Essentially, the project starts with the collection of existing art-related cases worldwide that have been resolved through ADR. Reflecting the variety of art-related issues, the scope of this research project reaches from Holocaust art restitution practice over diplomatic returns of archaeological treasures to private claims regarding authenticity or stolen art matters. The particular interest of the projected study lies in the outcome of these disputes resolved through ADR, such as arbitral awards, settlement agreements reached through mediation or conciliation procedure and “voluntary” or “spontaneous” restitution agreements. This information will be gathered to the extent that it has been published or otherwise made available. In due consideration of the confidentiality that often surrounds these outcomes, the Art-Law Centre’s network will be of great importance. Amongst others, the Art-Law Centre is part of an International Research Group GDRI (Groupement de recherche international), a research network, which brings together scientific partners from various countries to coordinate research on the theme of “Cultural Heritage and Art Law”.<sup>19</sup> A further challenge the research team will meet is the complexity of certain cases, involving various parties, intermediaries and consultants, as well as the wide geographical scope of the study.

As a next step, the collected information and documents will be registered in the Art-Law ADR Database, which will be tailored for this particular purpose. Each registered work of art will be displayed in the Database together with the necessary documentation for its identification and provenance, as well as a reproduction of the concerned work, where available. The database will serve as a basis for comparison and categorization of the solutions adopted in practice. Hence, in addition to the involved parties or the art object at stake, the categories of the database will also list the method of dispute settlement involved and the achieved result. By including the provenance and description of the art object, as well as a narration of the relevant historical facts, it would be possible to identify whether there are similarities in the reached settlements according to their historical background.

Finally, the gained results will be subject to an in-depth analysis and synthesis – a process which will particularly address the privileged methods and factual circumstances which led to the choice of one or the other method, and more specifically the implicated interests and the manner in which they were taken into consideration in the examined cases. The analysis will focus in particular on cultural property restitution cases.

### **5. ADR at Practice - Case Examples from the Geneva Art-Law Centre’s Art-Law ADR Database**

The ongoing practice of ADR in the art-law sector has been a crucial inspiration for the development of this research project. In fact, the Geneva Art-Law Centre has already collected a number of art-law cases that were resolved through ADR. Three of these cases are presented hereafter to illustrate why this research project was initiated. They also give an overview of different types of art-law disputes, typical issues that may arise, as well as the features of the applied ADR methods.

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<sup>19</sup> Further information regarding the members of the GDRI network and their ongoing research projects see [http://www.cecoji.cnrs.fr/article.php?id\\_article=105](http://www.cecoji.cnrs.fr/article.php?id_article=105) and <https://dri-dae.cnrs-dir.fr/spip.php?article231> (Retrieved September 6, 2010).

### *5.1 Mediation Agreement between Zurich and Saint-Gall Concerning a Terrestrial Globe*

A creative settlement has been reached in 2006 through mediation, in a dispute between the Cantons of Saint-Gall and Zurich that dates back to the religious wars of 1712.<sup>20</sup> During the so-called second “Battles of Villmergen” between Catholic and Reformed Swiss Cantons, a number of cultural objects that previously belonged to the Abbey Library of Saint-Gall had been transferred to Zurich. Through the signing of a Peace Treaty in 1718 in Baden, Zurich had agreed to return the large part of the cultural objects to the Abbey of Saint-Gall. The rest of it, about 100 manuscripts, books, paintings, astronomical devices and the Prince-Abbot Bernhard Muller’s cosmographical Globe are still being kept in the Central Library in Zurich, except for the globe, which is exhibited in the National Museum (Schönenberger, 2009).

The story almost sank into oblivion if it was not for a letter to the editor in a journal from Saint-Gall in 1996, claiming for the canton’s ownership of the cultural goods that had remained in Zurich (Lüscher, 2010). The increasing public debate led the Cantonal Executive Council of Saint-Gall to start formal negotiations by addressing a request to the Canton of Zurich for their return (Ibid). The claim was based on legal grounds according to which the objects had never been validly purchased as the applicable federal law on war already prohibited the robbery of cultural goods (Schönenberger, 2009). Zurich however, claimed that the acquisition of property on spoils of war was legitimate under the relevant international law at that time (Ibid).

Moreover, in view of the Peace Treaty and of the restitution that had already been made subsequent to the war, any asserted claims were forfeited or at least time-barred according to international law and therefore void (Ibid). Eight years of unsuccessful negotiations followed – an intolerable situation that led the two cantons to request the Confederation to act as mediator, as provided by the Swiss Constitution of 1999 (Renold, 2009). Under the leadership of a mediation-team assigned by the Swiss Government, political representatives of the two cantons and the responsible body of all the concerned libraries were finally able to settle the dispute in consideration of all the involved interests (Federal Department of Home Affairs, 2006).

A creative solution was negotiated and finally adopted by all the involved parties at the end of April 2006. The settlement agreement provides that Saint-Gall accepts Zurich’s ownership in the cultural objects that are in the hands of the National Museum and of the Central Library in Zurich since the happenings of 1712. Zurich recognizes in return, the relevancy of the objects for the cultural identity of Saint-Gall and agrees on an unpaid and indefinite loan of 35 manuscripts that belong to the Central Library Foundation in Zurich. It is also provided that any amendment or termination of the agreement can be made only after 38 years by a joint request from the highest executive of each party.

Furthermore, Zurich approved to produce the exact replica of the cosmographical Globe at its own expense, which has finally been donated to Saint-Gall (Cornu & Renold, 2010). The original is kept at the Swiss National Museum but has been lent to Saint-Gall for an exhibition of a period of four months (Federal Department of Home Affairs). As agreed, an exhibition of the manuscripts took place in September 2006 at the Abbey Library, which were in the following included in a special exhibition that took place between December 2006 and February 2007 (Schönenberger, 2009). The replica in turn was welcomed at the Abbey Library in Saint-Gall accompanied by a celebration in August 2009 and has since then found its place on the World Heritage Site.

In conclusion, the two Cantons reached a mutually satisfactory compromise that underlines the symbolic gesture both parties were willing to make in order to end their dispute. Indeed, instead of concluding with a typical judicial “black or white solution” (Renold, 2009, p. 1104), the parties opted for a solution in-between. With the acceptance of a long-term loan of the precious manuscripts instead of their restitution, they chose to share the benefits of the collection into ownership and proprietorship. In addition, the creation and funding by Zurich of the expensive copy of the cosmographical Globe in exchange of keeping its original, symbolizes Zurich’s willingness to donate considerable time and money in order to effectively compensate Saint-Gall’s loss.

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<sup>20</sup> The publicly announced agreement was reproduced in French in Cornu & Renold (2010) and is available online at: [www.news.admin.ch/NSBSubscriber/message/attachments/2567.pdf](http://www.news.admin.ch/NSBSubscriber/message/attachments/2567.pdf) (Retrieved September 6, 2010).



### *5.2 Restitution of Four Drawings by the British Museum to the Feldmann Heirs*

When it comes to claims for lost cultural property, intermediary institutions often provide assistance, including governmental advisory commissions, such as the New York State Banking Department's Holocaust Claims Processing Office (HCPO)<sup>21</sup>, the UK Department of Culture, Media and Sport Spoliation Advisory Panel<sup>22</sup>, or the German "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property"<sup>23</sup>, which issue recommendations on a given claim and may be seen as a type of conciliator between the parties at dispute (Theurich, 2009, August). Furthermore, a few non-profit organizations devoted to art research, such as the International Foundation for Art Research (IFAR)<sup>24</sup> or the Commission for Looted Art in Europe (CLAE)<sup>25</sup>, also provide information and assistance in a restitution process.

Such an intervention was decisive in a case concerning the legacy of Arthur Feldmann, an art collector from Czechoslovakia with a collection of about 750 Old Master Paintings that were then seized by the Nazis (Flescher, 2006). Arthur Feldmann died in 1941 of torture by the Nazis and his wife deceased in Auschwitz (Percival, 2009). The paintings were largely dispersed but Feldmann's grandson, Uri Peled, located several of them, including four Old Master drawings in the British Museum (Flescher & Wilmers, 2004).<sup>26</sup> Supported by various evidentiary documents, he approached the Museum with his concern.

When the claim for the four drawings became known, an American Professor raised doubts about the provenance of an Old Master drawing she had inherited - "*The Liberation of St. Peter*" originally attributed to Rembrandt (Ibid). That painting was sold at the same Sotheby's auction in 1946 as three of the four drawings from the British Museum, despite the fact that they had all been listed in 1934 in a catalogue raisonné by Otto Benesch as part of the Feldmann collection (Ibid, Hirst, 2004). Hence, the Professor discovered that the Feldmanns had been looting victims and that their heirs were seeking reparation (Flescher & Wilmers).

In search of an "objective and scholarly intermediary" (Ibid), the professor contacted IFAR (Ibid), which agreed to help free of charge and was able to allocate the drawing as part of the Feldmann's former collection. It cooperated with the Feldmann's representatives, the Commission for Looted Art in Europe, in order to reach an agreement and facilitate the restitution (Flescher, 2006). The painting was ultimately donated to the British Museum by Uri Peled after it had been returned to him in November 2004. Sole condition for the settlement was that the name of the American professor be kept confidential; indeed, she never asked for any monetary compensation (Ibid). If this case had gone to court, confidentiality would indeed have been difficult to maintain in light of the increasing interest in and press coverage of high value art court cases.

The process of restitution for the remaining four drawings was, however, more turbulent. When the Commission for Looted Art in Europe submitted a claim on behalf of the Feldmann family to the British Museum in 2002, the Museum's Trustees acknowledged that the artworks were wrongfully seized" and hence recognized the "unique moral claim" (Trustees of the British Museum, 2005, 2006). The Museum and the CLAE jointly submitted a claim to the Spoliation Advisory Panel in October 2002, indicating as "preferred solution" that "the claimants should be compensated for the full value of the drawings, and that the drawings should remain in the British Museum" (Hirst, 2006), notwithstanding the provisions of the British Museum Act 1963,

<sup>21</sup> For additional information on HCPO see <http://www.claims.state.ny.us/index.htm> (Retrieved September 6, 2010).

<sup>22</sup> For further Information on the Advisory Panel and its reports, see [www.culture.gov.uk/what\\_we\\_do/cultural\\_property/3296.aspx](http://www.culture.gov.uk/what_we_do/cultural_property/3296.aspx) (Retrieved September 6, 2010).

<sup>23</sup> For additional information on Advisory Commission and its members, see <http://www.lostart.de/Webs/EN/Kommission/Index.html>. (Retrieved September 6, 2010).

<sup>24</sup> For more information about the organization as well as an elaborated list of litigated and amicably settled art-disputes, see [www.ifar.org](http://www.ifar.org) (Retrieved September 6, 2010).

<sup>25</sup> For further information on the work of the Commission and its case studies, see <http://www.lootedartcommission.com/home> (Retrieved September 6, 2010).

<sup>26</sup> The works are: « The Holy Family » by Niccolò dell'Abbate, "St Dorothy with the Christ Child" by a follower of Martin Schongauer, "Virgin and Child adored by St Elisabeth and the infant St John" by Martin Johann Schmidt and "An Allegory on Poetic Inspiration with Mercury and Apollo by Nicholas Blakey". For illustrations, see Commission of Looted Art, 2002.

stipulating the duty of the Museum to keep the objects comprised in its collections except for one of the few cases expressly permitted by the Act (Section 3).

A few months later, the British Museum appealed to the Attorney-General and asked whether the addressee would be entitled to allow the Museum's Trustees to meet a moral obligation that arises from the Holocaust without the necessity of amending the British Museum Act (Trustees of the British Museum, 2005). The Attorney-General sought the guidance of the High Court whose decision (*Attorney-General v. Trustees of the British Museum*, 2005) ruled out such a return. Indeed, the High Court determined that the courts and judges are committed to upholding the law, and consequently each is obliged to apply the British Museum Act (*Ibid*, section 37). A compromise of a claim by the heirs of Dr Feldmann to be entitled to the drawings, such as the recognition that the drawing had never been part of the collection, would not involve any breach of the British Museum Act (*Ibid*). However, moral considerations alone would not justify a compromise or exception. Solely a statutory authority, which was missing in this case, could permit a divergence from statutory obligations (*Ibid*).

Regardless of the significant consequences of this decision for any further restitution claims asserted against national museums and galleries in the United Kingdom, its Trustees faced a challenging situation (Copping, 2008). On the one hand, the Museum had admitted their moral accountability to the Feldmann family and made every effort to meet their claim. On the other hand, it was clear that the Museum could not carry out any restitution under existing law without the authority of an Act of Parliament (Trustees of the British Museum, 2005).

After the High Court's decision, the Spoliation Advisory Panel concluded with the following recommendation: the Feldmann heirs should receive an ex gratia payment from the government for the four drawings as the British Museum was barred by law to restitute them (Hirst, 2006). It rejected the remedy of a legal compensation, given that the heirs were lacking a legal claim (*Ibid*). An ex gratia payment would instead reflect "the strength of the claimants' moral claim" and moreover allow the drawings to remain in the British Museum collection (*Ibid*). The sum of £ 175,000 had been determined in accordance with individual evaluations by several art experts (*Ibid*). It suggested that the government should cover these costs "as no legal ability or moral blame rest[ed] with the British Museum" (Trustees of the British Museum, 2006), what the British authorities, in fact, finally effected (Associated Press, 2006).

This case has certainly contributed to the perceived need for a revision of Nazi-looted art policies in the United Kingdom, and a "Holocaust (Stolen Art) Restitution Bill"<sup>27</sup>, which would allow victims of Nazi-Looted art to choose compensation or restitution, is now before the British Parliament (Percival 2009).

### 5.3 The Altmann Arbitration Case

Certainly one of the major contemporary restitution cases concerns Maria Altmann and her battle to recover six Gustav Klimt masterpieces, formerly owned by her uncle, the affluent Ferdinand Bloch-Bauer - patron of Klimt himself (Burris & Schoenberg, 2005). After their confiscation by the Nazis, three of them were transferred to the Austrian State Gallery in Vienna, partly relying on the will of Ferdinand's wife Adele asking in 1923 for the paintings to be bequeathed to the Gallery (Schönenberger, 2009). To the greatest regret of the heirs, their lawyer acknowledged the donation in exchange for the return of some other items, adding further complication to the case (Choi, 2005).

Subsequent to Austria's change of legislation in 1998, enacting post-war restitution laws to facilitate the return of expropriated artworks to their rightful owners, Maria Altmann sought justice. Unable to afford the filing fees a lawsuit in an Austrian court would have required - as they are based on the proportion to the amount

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<sup>27</sup> The Holocaust (Stolen Art) Restitution Bill is available on the Parliament's website at <http://www.publications.parliament.uk/pa/cm200809/cmbills/035/09035.i-i.html> (Retrieved September 6, 2010).

in dispute - the Californian resident ultimately filed suit against the Republic of Austria in the United States of America (Burris & Schoenberg).

Before any judge was able to verify the substantive merits of her allegations for unlawful expropriation, this landmark case was appealed before the U.S. Supreme Court on the issue of sovereign immunity (Ibid). Eventually, the Court ruled in *Altmann v. Republic of Austria* that the Austrian government was not falling under the immunity exemption and that Maria Altmann could proceed with her claim (at 688, 697)<sup>28</sup>. Four years of strenuous litigation had passed, when the parties agreed to meet for a settlement conference. During that conference, the parties consented to initiate a binding arbitration proceeding in Austria before an arbitral tribunal of three arbitrators (Choi). In a first arbitral award of January 15, 2006, the arbitral tribunal decided in favor of Maria Altmann and her family, and ordered the Austrian government to return all five of the paintings to Maria Altmann (*Maria V. Altmann, Francis Gutmann, Trevor Mantle, George Bentley, and Dr. Nelly Auersperg v. Republic of Austria*, 2006). In a second arbitral award of May 7, 2006, the arbitral tribunal rejected the restitution claim for a sixth painting which had a different background than the five others (Ibid). The five paintings were finally sold for a record setting amount to Ronald S. Lauder, who displayed them at the Neue Galerie in New York (Glazer, 2006).

The Altmann case attracted much attention from other Holocaust victims, encouraged to seek redress in U.S. courts for the restitution of artworks, and judicial authorities worldwide (Choi). In deciding to withdraw the state's immunity, the U.S. Supreme Court "reversed years of precedent to the contrary (...) and open[ed] the door to other suits against foreign nations in U.S. courts" (Ibid, p. 175).

Whereas the outcome of the lawsuit enabled the Altmann family to start negotiations with Austria, the negative repercussions of litigating such profoundly moral and strategic cases are not negligible (Neuborne, 2002; Burris & Schoenberg, 2005). In the multi-jurisdictional context of the claim combined with the involvement of a state institution, a lawsuit may indeed impede on the relationship between states and their museums. The fact that purchasers of stolen art are barred from obtaining good title possession of the artwork in the U.S.A., even if they had acquired the property in good faith, may certainly have contributed to the increase in lawsuits in U.S. courts (Mann, 2008).

Litigation indeed often proves detrimental to involved parties, which is why more and more cases are settled out of court. In light of the disparity of cases, a tailored settlement approach and agreement are essential (Ibid). The hope remains for the Supreme Courts' ruling in *the Altmann* case to be a strong incentive for owners of looted art to resolve their disputes in an amicable way (Bazyler & Kearston, 2004).

## 6. Conclusion

These cases reflect the recent promising developments in the resolution of art-related disputes. Alternative resolution methods are indeed gaining international interest at the level of governments, international institutions and other stakeholders in the art and cultural property sector and have provided an incentive for the creation of the ADR Art-Law Database. With this research project, the Geneva Art-Law Centre endeavors to positively contribute to this trend in reporting on the success of alternatively resolved art-law disputes.

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<sup>28</sup> Holding that the Foreign Sovereign Immunities Act (1976) and in particular its expropriation prohibition would apply retroactively to all actions.

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